IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No.237 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME-TAX - Applicant(s)
Versus
GUJARAT STATE EXPORT CORPN. LTD - Respondent(s)

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Appearance :
MS. M.M. BHATT for Applicant No(s).: 1.
MRS SWATI SOPARKAR for Respondent No(s).: 1.

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CORAM :HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 05/07/2005

ORAL JUDGMENT
(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The Income-tax Appellate Tribunal, Ahmedabad Bench 'B', has referred the following question for the opinion of this Court under Section 256(2) of the

Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income-tax.

"Whether the Appellate Tribunal has not erred in law and on facts in holding that the order of rectification made by the Income Tax Officer in respect of following items:

1)	Commission of sale to overseas Distributors	Rs. 825922
2)	Stationery & Printing (50% of Rs.160743)	Rs. 80372
3)	E.C.G.C. Promotion Exp.	Rs. 18054
4)	Expenses for participation in international Trade Fare	Rs. 174053
5)	Salary (50% of Rs.199350)	Rs. 546679
6)	Rent (50% of Rs.233537)	Rs. 116769
		Rs. 1661849

is not sustainable in view of the Supreme Court judgment in the case of Vokart Bros. (82 ITR 50)".

2. The Assessment Year is 1979-80 and the relevant accounting period is the Financial Year ended on 31st March, 1979. The assessee, a Limited Company,

in its return of income claimed weighted deduction under Section 35B of the Act on 17 items amounting to Rs.28,01,738/-. The Assessing Officer allowed the claim in respect of 15 items totaling to Rs.22,80,051/- vide assessment order dated 2nd March, 1982 passed under Section 143(3) read with Section 144B of the Act.

3. Thereafter, the Assessing Officer initiated rectification proceedings under Section 154 of the Act on the basis of the amendment carried out by Finance Act, 1978 to disallow weighted deduction in relation to the following items:

"Commission on sales to overseas Distributors	Rs. 825922
Stationery & Printing expenses (50% of Rs.160743)	Rs. 80372
E.C.G.C. Promotion expenses	Rs. 18054
Expenses for participation in International Trade Fare	Rs. 174053
Salary (50% of Rs.1093358)	Rs. 546679
Rent (50% of Rs.233537)	Rs. 116769"

He, accordingly, passed an order on 20th March, 1984.

4. The assessee carried the matter in appeal before C.I.T. (Appeals) who, for the reasons stated in his order dated 10th August, 1984, dismissed the appeal. The assessee filed Second Appeal before the Tribunal and the Tribunal allowed the appeal vide order dated 13th June, 1985. The principal ground, on which the appeal has been allowed by the Tribunal, is that the point at issue was highly debatable and, therefore, no action could be taken under Section 154 of the Act as held by the Apex Court in the case of *T.S. Balaram, Income-Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers & Ors.*, [1971] 82 ITR 50 (S.C.).

5. Ms. M.M.Bhatt, learned Standing Counsel appearing on behalf of the applicant – revenue, submitted that the amendment was clear and unambiguous and any expenditure which is incurred after 01.04.1978 and falling within sub-clauses (i) and (iii) of clause (b) of sub-section (1) of Section 35B of the Act cannot be allowed. That is the exercise

which the Assessing Officer undertook while framing the rectification order. She, therefore, submitted that the Tribunal was wrong in holding that the issue was debatable. According to her, if on a plain reading of the provision the mistake was apparent on record, nothing further was required and the Assessing Authority was within its jurisdiction to exercise the powers of rectification of such a mistake. She, therefore, urged that the question referred be answered in favour of revenue.

6. Ms. Soparkar, learned Advocate appearing on behalf of the respondent – assessee, in support of the order of the Tribunal, submitted that on an issue which was highly debatable the Assessing Officer was not entitled to exercise powers of rectification as laid down by the Hon'ble Supreme Court in case of *T.S. Balaram, Income-Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers & Ors. (supra).* She also invited attention to the decision in case of *Commissioner of Income-tax Vs. Cadila Laboratories (P.) Ltd*., [1996] 221 ITR 35 (Guj.) rendered by this Court to submit that payment of commission to its agents in foreign

countries would certainly amount to expenditure incurred wholly and exclusively for the promotion of sales outside India and on maintenance of agency outside India.

7. The Tribunal has recorded that while framing assessment order under Section 143(3) read with Section 144B of the Act, the Assessing Officer had nowhere mentioned various sub-clauses of Section 35B(1)(b) of the Act under which the respective items were allowed weighted deduction. That it was only while passing the order under Section 154 of the Act that the Assessing Officer spelt out for the first time that weighted deduction on the disputed items was allowed under sub-clauses (i) and (iii) of Section 35B(1)(b). It is in this context that the Tribunal has come to the conclusion that the point at issue is highly debatable and, therefore, no action could be taken under Section 154 of the Act.

8. It is apparent from the assessment order as well as order of rectification that the Assessing Officer has referred to sub-clauses (i) and (iii) of Section 35B(1)(b) of the Act only during

rectification proceedings. Therefore, it is not possible to state, one way or the other, that while granting deduction originally in the assessment order each of the disputed items had been allowed only under sub-clauses (i) and (iii) of Section 35B(1)(b) of the Act. As can be seen from the first item which is disputed, viz. Commission of sales to overseas Distributors, whether or not it falls within sub-clause (i) and/or sub-clause (iii), it would yet require consideration whether the same would also fall or not under sub-clause (viii) of Section 35B(1)(b) of the Act. Thus, if an item is prima facie capable of being governed by either of the sub-clauses, viz. Sub-clause (i) and (iii) on one side and sub-clause (ii), (iv) to (ix) on the other side, it cannot be stated that merely because it falls either under sub-clause (i) and/or sub-clause (iii) it would be mistake apparent on record if the said item also conceivably could fall under any of the sub-clauses of the latter group. As laid down by the Apex Court in the case of *T.S. Balaram, Income-Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers & Ors. (supra)* it is not open to the Assessing Officer to

go into the true scope of the relevant provisions of the Act in a proceeding under Section 154 of the Act. A mistake apparent on record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions.

9. Applying the aforesaid principles to the facts of the case it is apparent that the Tribunal was justified in holding that the true scope of Section 35B of the Act could not be subject matter of rectification proceedings as the issue was highly debatable and as to which item would fall under each of the sub-clauses was not within the scope of the powers that the Assessing Officer could exercise under Section 154 of the Act.

10. It is necessary to take note of the fact that the Tribunal has stated that it agrees with the submission made on behalf of the assessee that the disputed items were allowed under sub-clause (ii) of Section 35B(1)(b) of the Act. Considering the controversy which was brought before the Tribunal it was not necessary for the Tribunal to record

such an opinion especially in light of the fact that the Tribunal itself has found, and rightly so, that in the original assessment order the Assessing Officer had not mentioned any sub-clause under which the items were allowed weighted deduction. This finding of the Tribunal was, therefore, not called for in the facts and circumstances of the case.

11. The Tribunal was, therefore, right in holding that the order of rectification made by the Assessing Officer in respect of the six items stated in the question was not sustainable in view of the Hon'ble Supreme Court judgement in case of *T.S. Balaram, Income-Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers & Ors. (supra).* The question referred for the opinion of this Court is, therefore, answered in the affirmative i.e. in favour of the assessee and against the revenue.

12. The reference stands disposed of. There shall be no order as to costs.

Sd/-
[D.A. MEHTA, J]

Sd/-
[H.N. DEVANI, J]

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